IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/03/2004

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THE HONORABLE MR.JUSTICE M. CHOCKALINGAM

SECOND APPEAL NO.1283 OF 1993

Gouri .. Appellant

-Vs-

Kamalakshi .. Respondent

This second appeal is preferred under Section 100 of CPC against the judgment and decree of the learned Subordinate Judge, Kuzhithurai made in AS No.39 of 1992 dated 31.3.1993 confirming the judgment and decree of the learned Principal District Munsif, Kuzhithurai made in OS No.543 of 1991 dated 7.4.1992.

!For Appellant : Mr.R.N.Amarnath

^For Respondent : Mr.Peppin Fernando

:JUDGMENT

The defendant whose plea was rejected by both the courts below in a suit for declaration, permanent injunction and mandatory injunction is the appellant herein.
2. The following short facts are noticed in the pleadings of the parties.
The immovable property more fully described in the plaint originally belonged to one Nallathambi Nadar, the father of the plaintiff and the defendant. He executed a Will on 5.9.1984 in which the plaintiff was shown as second party and the defendant was shown as first party. B schedule property was allotted to the plaintiff and the A schedule property was allotted to the defendant. The suit property was described as B schedule item No.1 in the Will. On the death of Nallathambi Nadar, the Will came into force. As per the Will, the plaintiff became the absolute owner of B schedule property. There was a Well in the plot of the plaintiff. The residential house of the plaintiff is also situated in the same plot. During the life time of Nallathambi Nadar, the plaintiff and the defendant were also taking water from the Well with bucket and rope by exercising manual labour. After the death of Nallathambi Nadar, they continued to take water in that manner. While so, the defendant had installed the compressor on 29.9.1991 within the Well and pipe fittings were attached to the compressor and electric lines were also drawn

within the suit property taking advantage of the absence of the plaintiff. The action of the defendant was unlawful and illegal, and hence, there arose a necessity to file the suit seeking for declaration that the suit property belonged to the plaintiff and mandatory injunction for the removal of the said compressor machine, pipelines, electric fittings, etc. and for permanent injunction restraining the defendant from interfering with the peaceful possession and enjoyment of the property by the plaintiff.

3. The suit was resisted by the defendant inter-alia stating that the plaintiff has no cause of action for filing the suit; that the Will mentioned in the plaint is an admitted one and the same came into force in the year 1984 after the death of Nallathambi Nadar; that it is also true that the properties mentioned in the schedule B of the Will were set apart for the plaintiff and A schedule were set apart for the defendant; that the mother of the defendant also died few years back; that she had a right of enjoyment over all the properties including the Well; that insofar as the Will in question, there is a clear provision in the Will that the water was being taken from that Well and being used and the right that was exercised should continue to exist even after the death of the testator by the allottees of both A and B schedules; that after the death of the testator, the owner of B schedule should not raise any dispute or objection as to the exercise of right over the Well; that the said provision was absolutely binding on the plaintiff; that the testator in his last Will and testament did not prescribe any particular method for lifting water from the Well nor he referred the existing method or device for drawing water from the Well; that all that he said was that the water was being drawn and used and that right should continue to exist and should have available to the owner of A schedule property even after his life time; that how the water, which went deep beneath the ground, should be brought up to surface was for the users to decide; that the testator never limited or restricted in any manner of the use of water by the defendant from the Well; that it is true that the defendant was taking water from the well lying in the suit property by using mini pump having 0.5.HP; that the defendant have every right to do so and the plaintiff cannot dispute or question the same; that the plaintiff cannot suffer any loss or injury by the defendant using the Well by taking water by using that method, and thus, the plaintiff was not entitled for the relief as asked for.

4. The trial court framed necessary issues, tried the suit and decreed the same. An appeal preferred by the defendant was also dismissed. Hence, the defendant has brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court for consideration:

1) Whether the Courts below were right in its construction of the scope and terms of the grant under the Will Ex.A.1? and

2) Whether the Courts below misconstrued the scope and extent of the grant under Ex.A-1 to deprive the right of the appellant to have access to the property and draw water from the well in question?

6. This Court has heard the learned counsel for the appellant/ defendant and also the learned counsel for the respondent.

7. Admittedly, the parties to the proceedings, namely, the plaintiff and the defendant were the daughters of one Nallathambi Nadar, who executed a Will on 5.9.1984 bequeathing A schedule property to the defendant and B schedule property to the plaintiff. On the death of Nallathambi Nadar, the

said Will came into force and the parties became the owners of their respective shares. It is also not in controversy that there is a Well in the B schedule what was allotted to the plaintiff. It is also not in dispute that the defendant has also been given right to take water from the Well situated in B schedule, which belonged to the plaintiff.

8. The case of the plaintiff was that during the life time of Nallathambi Nadar, the water from the well was being drawn using buckets and ropes by exercising manual labour and taking advantage of the absence of the plaintiff, the defendant has installed a compressor within the Well and pipe fittings were given to the said compressor and electric lines were also drawn within the suit property, which action was illegal and has caused loss and prejudice to the plaintiff, and hence, the relief should be granted in his favour. The prime defence plea before the courts below and equally here also is that it is true that right has been given to the defendant to take water, but the method in which water was to be taken from the well was not mentioned. Thus, the bucket and rope theory for taking water by exercising manual labour was only an imagination of the plaintiff and the right of the defendant to take water cannot be restricted to drawing of water by using of bucket and rope, and thus, the installation of machine, pipe fittings and electric connection are all well within her right. From the very admission made by the defendant, it would be abundantly clear that he has deepened the well by installing the pipe fittings, compressor machine and also by drawing electric wires. D.W.1 has categorically admitted that during the life time of Nallathambi Nadar and after his death and also till the installation of the said machine, the parties were drawing water by using bucket and rope by exercising manual labour.

9. A perusal of Ex.A.1 Will would clearly indicate that the right has been given to the defendant to take water in the well situated in the plaintiff's land. It is also true that the the method in which water has to be taken was not indicated therein. But, it is quite evident from the testimony of D.W.1 that during the life time of Nallathambi Nadar and after his death, the parties have been taking water from the well only by using manual labour and not otherwise. Under the stated circumstances, permitting the defendant to take water by using mechanical process or through electric fittings would be nothing but causing loss and prejudice to the plaintiff's interest, and hence, the right that has been given in the Will can be interpreted only in such a way that the defendant was given right to take water in the method in which it has all along been taken and not otherwise. There cannot be any impediment for the defendant to take water from the well, since it was the right given under the Will, but it cannot be exercised in such a way, which would cause prejudice to the opposite party and the same cannot be permitted. Hence, both the courts below were perfectly correct in rejecting the defence plea and granting the relief as asked for by the plaintiff.

10. Hence, this second appeal fails and the same is dismissed, leaving the parties to bear their costs.

Index : Yes
Internet : Yes

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To
1. The Subordinate Judge, Kuzhithurai
2. The Principal District Munsif, Kuzhithurai
3. The Record Keeper, VR Section,
High Court, Madras